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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANN DAVIS,

Petitioner,

v.

AT&T COMMUNICATIONS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THIS COURT'S DECISIONS INTERPRETING TITLE VII BAR SUMMARY JUDGMENT IN A TITLE VII TERMINATION CASE WHERE THE EMPLOYEE HAS ADMITTEDLY MADE OUT A PRIMA FACIE CASE OF DISCRIMINATION?

II. WHETHER THIS COURT'S DECISIONS INTERPRETING TITLE VII BAR SUMMARY JUDGMENT IN A TITLE VII TERMINATION CASE WHERE THE EMPLOYEE HAS ADMITTEDLY MADE OUT A PRIMA FACIE CASE OF DISCRIMINATION AND PRESENTS INDEPENDENT EVIDENCE FROM WHICH A JURY COULD RATIONALLY REJECT THE EMPLOYER'S STATED REASON FOR THE TERMINATION?

PARTIES TO THE PROCEEDINGS BELOW

The parties to this action are Plaintiff/Petitioner Ann Davis and Defendant/Respondent AT&T Communications, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ann Davis hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

None of the opinions below are reported. They are set forth in the appendix hereto.

STATEMENT OF JURISDICTION

The opinion and judgment of the eleventh circuit court of appeals was entered on September 27, 1996. This petition is filed within ninety days of the entry of the opinion and judgment. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

This action presents critical issues of great significance to all lower federal courts relative to summary judgment procedure in the context of employment discrimination suits. The case directly implicates two specific provisions of Fed. R. Civ. P. 56 and two specific provisions of Title VII of the Civil Rights Act of 1964. Fed. R. Civ. P. 56(c) provides as follows:

> *(c) Motion and Proceedings Thereon.*
>
> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(e) provides as follows:

> *(e) Form of Affidavits; Further Testimony; Defense Required.*
>
> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Title VII, 42 U.S.C. § 2000e-2(a)(1) provides as follows:

> *(a) Employer practices*
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Title 42 U.S.C. § 2000e-3(a) provides as follows:

> *(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.*
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees

or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. Basis for Jurisdiction in the District Court

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331.

B. Course of Proceedings and Disposition Below

Prior to her termination, Davis filed this action in the Superior Court of Fulton County, Georgia on July 16, 1992, alleging a claim of gender discrimination and harassment under Title VII of the Civil Rights Act of 1964, in addition to various state law tort claims. AT&T thereafter removed the case to this Court on August 19, 1992.

The case was referred to Magistrate Judge Joel M. Feldman on August 24, 1992. AT&T filed its Answer on August 26, 1992. Davis was deposed on December 15, 1992. After she was fired on January 11, 1993, she amended her Complaint to allege a claim of Title VII retaliation in addition to violations of the Americans with Disabilities Act, and the Employee Retirement Income Security Act. [R1-26, 27, 53]. AT&T filed its Answers to the amended complaints on April 28, 1993 and October 8, 1993.

After the completion of discovery, AT&T filed its motion for summary judgment on January 14, 1994.

Davis filed her response, and a hearing was held before Magistrate Judge Feldman on May 31, 1994. Additional briefs were thereafter received by the Court. On September 22, 1994, Magistrate Judge Feldman issued a Report and Recommendation ("R&R") recommending that AT&T's motion for summary judgment be denied as to Davis's retaliatory discharge claim, but recommending that summary judgment be granted as to all other claims, including the sexual discrimination/harassment claim. Both parties thereafter filed objections to the R&R.

On November 29, 1994, the District Court, the Honorable G. Ernest Tidwell, entered an Order rejecting the Magistrate Judge's recommendation that AT&T be denied summary judgment as to Davis's claim of retaliatory discharge, but adopting the Magistrate Judge's recommendation that summary judgment be denied as to Davis's claim of sexual discrimination and harassment. Davis thereafter filed a timely motion for reconsideration. The motion was denied and overruled by the district court on February 2, 1995. Davis filed her notice of Appeal on February 15, 1995. The Court of Appeals entered its judgment and opinion affirming the trial on September 27, 1996.

C. Statement of the Facts

Davis was employed by AT&T for 27 years, from September of 1965 until she was terminated on January 11, 1993. The termination took place less than one month after Davis was deposed in this action. At the time she was fired, Davis was away from work, receiving psychological treatment due to gender harassment inflicted on her by her AT&T superior, Larry Newton.

Prior to her termination, Davis was subjected to highly crude, offensive and unwelcome conduct on the part of Mr. Newton. Beginning in January of 1991, Davis heard Newton repeatedly refer to women as "bitches", "stupid bitches" and "dumb bitches." Newton used the word "bitch" in Davis' presence at work, and also referred to Davis herself as a "bitch." Newton also repeatedly used

racial slurs at work and referred to Jackie Wilson, his boss, as "Jackie Boy." Newton also referred to "faggots" and "queers" both in Davis' presence of others.

After a number of abusive meetings with Newton in which she insisted (to no avail) that he stop, Davis approached Jackie Wilson, Newton's boss, to complain about his discriminatory attitude regarding women in general, and his specific abuse of her individually. Davis told Wilson of Newton's habit of treating her in a less favorable manner than the men in the office, including matters relating to work assignments, meetings, and information sharing.

After having gone out on medical disability leave in August of 1991 due to Newton's misconduct, Davis approached AT&T's EEO Department. The conclusions reached by that office in December of 1991 were as follows:

> After interviewing twelve managers, I determined that *gender harassment did take place, along with racial slurs and also intimidation.* Larry Newton has been scheduled for Diversity training in Chicago this month. . . .
>
> * * * *
>
> Larry Newton has been heard, more than once, using racial slurs in the office. The term nigger, jackie-boy, and queers has been said by Larry. He also commonly referred to females as bitches . . . It has been determined that Larry used his position of power to intimidate employees freely . . . It has also come to the attention of others, including district level managers, were aware of some of the slurs, but "tolerated" Larry because of their appreciation for his technical expertise . . .

Due to Newton's misconduct and AT&T's egregious failure to act on Davis' complaint, Davis was placed on medical disability in August of 1991. Thereafter AT&T ordered her to return to work in November of the same

year. In the meantime, Davis advised Josie Alston, the AT&T disability manager then assigned to her case, that Newton's sexual discrimination and harassment was the cause of her disability, and that this misconduct was the subject of an internal EEO complaint Davis had lodged. Davis's treating psychologist, Dr. Dudley, wrote to AT&T concerning Davis' condition:

> the trauma and sense of degradation which Ms. Davis experienced in the work place has precipitated an emotional crisis in the present which has its origins in her long-standing history of abuse in her family. . . .

Davis also wrote to Alston at the time she was ordered back to work, stating that:

> You can understand my reluctance to trust or believe that AT&T has been willing to resolve this situation since, to date, I have received absolutely no indication from AT&T that my EEOC complaint has been promptly and properly investigated. Therefore, I believe that AT&T not only accepts, but continues to condone, the extremely abusive and blatant discrimination I have suffered by the actions of Larry Newton.

The letter from Dudley and Davis to Alston were filed in Davis' AT&T disability file, which was initially handled by Alston.

Alston was not the only AT&T "disability manager" who worked on Ann Davis' August, 1991 medical disability case. To the contrary, another "disability manager", Carol Eldridge, was also involved in the processing and handling of Davis' August 1991 medical disability. Based on Eldridge's involvement in handling this first of Davis' two disability leaves, she had knowledge, as of January 1992, that Davis was alleging (1) that she had been sexually harassed by Newton and (2) that

AT&T had stood by and done nothing about the "gender harassment" of which Newton was guilty.[1]

After being returned to work by Eldridge in January of 1992, Davis was assigned to the supervision of Paul Gibb in a completely different job assignment than she had previously held. Previously, Davis had been a "Planner." After returning to work, she was thrust into the completely foreign position of "implementer." From January of 1992 until June of 1992 (when she went out on a second medical disability leave), Davis was assigned to perform purely clerical duties as an "implementer" under Mr. Gibb's supervision. Those duties required only 45 minutes a day to perform. The rest of the time Davis was left idle, with nothing to do. This situation was absolutely intolerable to Davis, and she repeatedly raised it with her supervisor, Mr. Gibb. Gibb appeared irritated, and said he simply had no work to give her. By this time, Gibb admittedly knew that Davis was embroiled in some type of legal controversy with AT&T, since he had been told by the company's lawyers that there were "restrictions" on Davis's return to work.

On or about January 23, 1992, Davis filed a charge of discrimination and retaliation against AT&T with the U.S. Equal Employment Opportunity Commission, alleging both sex discrimination and retaliation, based on New-

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[1] As discussed herein, Eldridge's involvement in the proceeding of Davis's initial medical disability is a key fact in the case. Later, it was Eldridge who handled Ms. Davis's second disability, during which Ms. Davis was fired. For present purposes, the relevance of Ms. Eldridge's involvement in Davis's initial disability is her access to the information contained in AT&T's disability files. The two disability files together included a number of documents clearly referencing Ms. Davis's legal claims against AT&T, claims of which Ms. Eldridge said during her deposition she had no knowledge of until December of 1992. Importantly, these files included two letters from Davis's attorney—one to Gina Riley, of AT&T's EEO Department, and one to AT&T attorney David Forbes, detailing at length Ms. Davis's legal claims against the company.

ton's continued misconduct, AT&T's deliberate failure to meaningfully respond to Davis' complaints, and AT&T's assigning her to pseudo job with no duties or responsibilities upon her return from medical disability leave.

Also on or about January 23, 1993, Davis wrote to AT&T, specifically to the EEO Department, detailing again her complaints against Newton, and the company's inaction with regard to those complaints. This letter was later included in Davis' AT&T disability file.

In June of 1992, due to the continuing effects of Newton's misconduct, Davis again found herself in a state of emotional crisis, including depression and anxiety so severe as to make it impossible for her to continue working. In addition to the effect of Newton's misconduct, Davis' condition was due in part to AT&T's lack of any meaningful response to her complaints, and the Company's having forced her into a meaningless and absurd job that had no defined duties or responsibilities. As a result, Davis went out on a second medical disability leave in June of 1992.

This lawsuit was filed on July 16, 1992, alleging gender discrimination/harassment and retaliation. AT&T filed its Answer on August 26, 1992. Two months later, Davis was ordered by Disability Manager Carol Eldridge (who had also been involved in processing Davis' first disability), to see a company paid physician, Dr. Ronald Rosen, for a "second opinion" regarding her disability. No explanation was given for the sudden need for a second opinion. Eldridge admits that she had no reason to question the then recent certification of Davis' treating psychologist, Dr. Dudley, to the effect that Davis continued to be completely disabled from working at the time.

Eldridge admittedly arranged for Davis's visit to another physician, Dr. Rosen. In doing so, she advised Dr. Rosen's office that Davis was involved in a "lawsuit" against the company and that she couldn't "get along [with] her supervisor." Eldridge's providing this informa-

tion to Dr. Rosen's office is evidenced by the referral slip created in Dr. Rosen's office on October 13, 1992—the time Davis's appointment was arranged for by Ms. Eldridge—a document which was *admittedly produced to AT&T by Dr. Rosen and produced by AT&T* in response to Plaintiff's discovery requests.

The referral slip is a very important document in this case. It identifies Eldridge as the person who made the arrangements for the visit on behalf of AT&T, and evidences Eldridge's knowledge, as of October 13, 1992, that Davis was suing AT&T. *Eldridge, however, falsely testified under oath in this case that she knew nothing of the litigation until after she formally decertified Davis from her second disability, on December 7, 1992.* This testimony was patently false.

The false nature of Eldridge's disavowal of knowledge of Davis' legal dispute with AT&T prior to December 7, 1992 is also apparent from other sources. On November 20, 1992, Dr. Rosen's office apparently provided Eldridge with a narrative relative to Davis' case. The narrative, dated November 20, 1992, stated:

> The patient lives alone and presents with the following: '. . . I moved to Atlanta in August of 1990 and began to have problems with her supervisor, Larry Newton, getting him to define the job and comments he made about women and blacks . . . Her supervisor would make sexist and racist comments which I found aversive.' Her supervisor called women bitches and made regular racial comments . . .

On the same day, November 20, 1992, Davis received a telephone call from Eldridge, telling her that based on Doctor Rosen's findings, she was being required to return to work on November 23, 1992. Davis advised Eldridge that she was still medically disabled, and that Dr. Dudley, who had been treating her, had recently recertified her disability.

According to Dr. Rosen's narrative of November 20, 1992, Davis was suffering from "Panic Disorder, Mild to Moderate", and "Major Depression, Moderate." Rosen recommended that Davis use two prescription drugs, "Tofranil" and "Xanax". Notwithstanding his conclusions and recommendations for mood altering drugs, Rosen stated that Davis could return to work. Eldridge admitted that she had no idea whether an individual using these drugs was competent or able to return to work, but admitted that she made no effort to arrange for another medical opinion, despite the conflict in the findings of Drs. Dudley and Rosen relative to Davis' ability to return to work. Both Alston and Eldridge acknowledged that given the conflict, AT&T could have sought another opinion, and had done so in "conflict" situations in the past. But, this was not done in Davis' case.

During Davis' ensuing discussions with Eldridge, she repeated that one of the reasons she could not return to work was the misconduct of Larry Newton. Eldridge indicated to Davis that this should not be a problem, since, according to Eldridge, Newton was no longer her supervisor. Eldridge told Davis at the time that she would no longer be certified as disabled, and would not be paid unless she returned to work. At the conclusion of her November 20, 1992 discussion with Eldridge, Davis indicated to Eldridge that she would turn the matter over to her attorney.

After Eldridge told Davis that she was again being forced back to return to work despite her continuing disability, Davis was seen by Dr. Carl Schroeder, a psychiatrist in North Carolina. On December 3, 1992, Dr. Schroeder confirmed in writing to AT&T that Davis was medically disabled from working, and therefore could not return to work at that time.

Dr. Schroeder's written finding was transmitted by Davis to AT&T's attorneys on December 3, 1992. Dr. Schroeder's finding was then personally delivered to Ms.

Eldridge by Ken McNeely, an attorney employed in AT&T's legal department, on December 7, 1992—the date that Eldridge falsely testified in her deposition that she first learned of this lawsuit against AT&T. The reason for the delivery of the materials to Eldridge was for her to assess whether Davis should be permitted to remain on medical disability leave. Still, despite having been provided with substantial medical corroboration to the effect that Davis continued to be fully medically disabled from returning to work, Eldridge continued to insist that Davis return to work.

Davis was fired on January 11, 1993. Her deposition in this case was taken just days before, on December 15, 1992. The deposition was attended by three attorneys representing AT&T, including Kenneth P. McNeely, the same AT&T in-house attorney who delivered Dr. Schroeder's findings to Ms. Eldridge on December 7, 1992.

AT&T's (Eldridge's) continued return-to-work directive was communicated to Davis by phone and letter by Mr. Gibb, her purported supervisor prior to going out on her second medical disability leave in June of 1992. In a phone conversation on December 8, 1992, Gibb and Davis discussed her legal claims against the company and against Larry Newton. In a subsequent letter dated December 28, 1992, Gibb stated that Davis had still "not produced enough medical information or evidence" to substantiate her disability.

Gibb's statements in this regard were false. Previously, on December 23, 1992 Davis provided AT&T with a detailed narrative from Dr. Schroeder substantiating her continuing medical disability. This information was admittedly provided to Eldridge for her consideration. Apparently, it was simply ignored, despite the fact that Davis had now produced disability certifications from two health care practitioners (Schroeder and Dudley) to the effect that she was fully disabled from returning to work.

Even after Schroeder's narrative was submitted, AT&T continued to insist that Davis had not provided sufficient documentation of her disability. Accordingly, on December 31, 1992, Davis wrote to AT&T and asked the company to identify precisely what information it required in order to properly evaluate the situation. AT&T never responded to this request, and simply continued to insist that Davis return to work, notwithstanding her submission of materials confirming her medical disability.

Gibb, Davis' ostensible supervisor prior to her second disability leave, claims that *he* made the decision to fire Davis. Nonetheless, it is crystal clear that Carole Eldridge—the woman who lied during her deposition concerning her knowledge of the litigation—made the underlying decision that Davis be forced off medical disability leave, a decision which led directly to Davis' termination. Gibb admits that he was aware of Davis' lawsuit against AT&T at the time. He also admits that he frequently conferred with AT&T's legal department (McNeely). The termination decision—supposedly made by Gibb—but clearly based on Eldridge's decertification of Davis' disability—was plainly done with the direction, encouragement and support of AT&T's in-house legal department, based on the tainted determinations of Carole Eldridge.

REASONS FOR GRANTING THE WRIT

I. THE LOWER FEDERAL COURTS ROUTINELY MISAPPLY THIS COURT'S TITLE VII PRECEDENTS BY GRANTING SUMMARY JUDGMENT EVEN AFTER THE PLAINTIFF MAKES OUT A "PRIMA FACIE CASE" OF DISCRIMINATION.

The lower federal courts devote substantial time and resources to adjudicating claims brought under federal anti-discrimination statutes such as Title VII. While this Court has provided significant guidance concerning the applicable framework for analyzing "disparate treatment"

claims,[2] it has not done so specifically in the context of summary judgment proceedings under Fed. R. Civ. P. 56. With regard to proceedings under Rule 56, the lower federal courts continuously and persistently err in granting defense motions for summary judgment in cases such as this one, in which the plaintiff makes out a "prima facie case" of discrimination.

Both before the trial court and the court of appeals, Davis argued that based on this Court's precedent, and the undisputed conclusion that Davis successfully made out a prima facie case of retaliatory termination, summary judgment could not properly be granted. Regrettably, both Courts failed to consider, address, or discuss this very critical question.

In *McDonnell Douglas, supra,* this Court set forth a methodology for analyzing and adjudicating Title VII "disparate treatment" claims. The holding in that case and its progeny, including *Furnco, Burdine, Aikens,* and *Hicks,* makes clear that under settled Rule 56 principles, summary judgment on the issue of discriminatory intent cannot properly be granted once a Title VII plaintiff establishes a "prima facie case" of unlawful discrimination.

Under *McDonnell Douglas,* the Plaintiff bears the initial burden of establishing a prima facie case of discrimination. "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine, supra,* 101 S. Ct. at 1094. Once the plaintiff succeeds, the defendant has the burden to produce a "legitimate, non-discriminatory reason" for the allegedly discriminatory employment

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[2] *See, McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d (1981); *U.S. Postal Service v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *St. Mary's Honor Society v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

action. If the employer fails to meet this burden, the prima facie case of the plaintiff stands unrebutted, and judgment must be entered for the plaintiff as a matter of law. *Burdine, supra,* 450 U.S. at 254, 101 S. Ct. at 1094. If the employer articulates a sufficient response, what remains is "the credibility assessment stage", *Hicks,* 113 S. Ct. at 2748, and the trier of fact is required to "decide which party's explanation of the employer's motivation *it believes. Aikens,* 103 S. Ct. at 1482. Consistent with summary judgment principles too settled to bear repeating, resolution of this issue cannot be accomplished short of a decision by the trier of fact. *Rollins v. TechSouth,* 833 F.2d 1525, 1529 (11th Cir. 1987) (credibility determinations not appropriate at summary judgment stage).

McDonnell Douglas, Burdine, Aikens and *Hicks,* make clear that once the plaintiff makes out the prima facie case, even in situations in which the employer then articulates a "legitimate, non-discriminatory reason" for its conduct, what remains is an issue of fact on the question of discriminatory intent, a question not susceptible of judgment as a matter of law.

In *Burdine,* the Court discussed at length the purpose and scope of the employer's burden to articulate a non-discriminatory reason for its action, stating that:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises *a genuine issue of fact* as to whether it discriminated against the plaintiff. 101 S. Ct. at 1094.[3]

This passage is not vague or ambiguous. It specifically provides that once the employer has presented its rebuttal, the question of discriminatory intent remains *"a*

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[3] In *IMPACT v. Firestone,* 893 F.2d 1189, 1193-94 (11th Cir. 1990), the Eleventh Circuit echoed the *Burdine* standard concerning the employer's rebuttal burden, that is, it must be sufficient to create "a genuine issue of fact".

genuine issue of fact". This conclusion is supported by the very purpose of the employer's rebuttal burden, that is, "to frame *the factual issue* with sufficient clarity so the plaintiff will have a full and fair opportunity to demonstrate pretext". *Burdine,* 101 S. Ct. at 1095. [emphasis added].

This Court's subsequent decisions in *Aikens* and *Hicks* confirm that the establishment of the prima facie case precludes summary judgment, because what is presented *after* the employer's proffered explanation is purely a credibility issue for the trier of fact. *Aikens* makes this quite clear:

> [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, *the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII.* At this stage, the *McDonnell-Burdine* presumption "drops from the case" [citation omitted], and the factual inquiry proceeds to a new level of specificity". [citation omitted] After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. [citation omitted] The District Court was then in a position to decide the ultimate factual issue in the case. 103 S. Ct. at 1481-82.

The Court went on to say in even plainer terms that what remains after the employer's explanation is a question of fact reserved to the trier of fact:

> In short, the district court must decide which party's explanation of the employer's motivation *it believes.* 103 S. Ct. at 1482.

Aikens, therefore stands for the proposition that where the plaintiff makes out a prima facie case, the issue of

the employer's true motive must be left to the trier of fact, since this determination is based solely on credibility, that is, which party "it believes." [4]

This reading of *Aikens* finds strong support in this Court's recent decision in *Hicks*. Commenting on the nature of the employer's rebuttal burden, the Court stated that:

> the Defendant must clearly set forth, through the introduction of admissible evidence reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action." *Hicks,* 113 S. Ct. at 2747, *citing, Burdine,* 101 S. Ct. at 1094-1095 and n.8. [emphasis in *Hicks*]

This passage is strong evidence that after the plaintiff makes out a prima facie, the trier of fact must decide whether it believes the employer's stated rationale. If the answer is no, only the trier of fact (not the court), may decide the ultimate issue of discriminatory intent.

This is not the only indication in *Hicks* that once the plaintiff makes out the prima facie case, the question is purely one of credibility. Referring to the stage in the case where the plaintiff has made out a prima facie case, and the employer has offered a legitimate reason for its action, the Court commented as follows:

> In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional

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[4] The holding in *Aikens* finds strong support in *Burdine.* The "believability" issue was discussed in that case under the rubric of whether the employer's stated reason was "unworthy of credence". *Burdine, supra,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094. The *Burdine* court also noted that in some cases, the plaintiff's prima facie case "combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Burdine,* 101 S.Ct. 1089, 1095 n.10.

> discrimination) can involve no credibility assessment. For the burden of production determination necessarily precedes the *credibility-assessment stage*. 113 S. Ct. at 2748.

"Credibility assessment", of course, is not a function of the court at the summary judgment stage.

In light of the very clear precedent of this Court regarding the effect of establishing a prima facie case, the requirements of the employer to rebut the prima facie case (sufficient to create an issue of fact—*Burdine, Hicks*), and the resulting "credibility assessment stage" (*Hicks*), it is clear that summary disposition of employment discrimination claims is not permitted under Rule 56. Rule 56 specifically prohibits summary judgment in cases where there exists a genuine issue of material fact. Since an issue of fact is what the trier of fact confronts after the employer offers its evidence, and the plaintiff may prevail by destroying the employer's credibility via cross-examination, summary disposition is inappropriate after the plaintiff makes out a prima facie case.[5]

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[5] Summary judgment is clearly not appropriate in cases which turn on credibility. In this regard, district judges in the eleventh circuit routinely give the following charge to juries regarding the question of credibility: "Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness has to say, and how important that testimony was. *In making that decision, you may believe or disbelieve any witness, in whole or in part . . .*" Because the trier of fact must choose which party's version of the evidence it believes, *Aikens, supra*, the establishment of the prima facie case clearly eliminates the court's role in ruling on the issue as a matter of law.

II. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING THE ISSUE OF WHETHER SUMMARY JUDGMENT MAY PROPERLY BE GRANTED WHERE THE PLAINTIFF MAKES OUT A PRIMA FACIE CASE AND PRODUCES INDEPENDENT EVIDENCE FROM THE TRIER OF FACT COULD REJECT THE EMPLOYER'S STATED REASONS FOR ITS ACTION.

Assuming that the plaintiff's prima facie case is not alone sufficient to bar summary judgment, it nonetheless defies imagination (and flies directly in the face of this Court's precedent) to argue that the prima facie case—coupled with independent evidence from which the jury could reject the employer's stated reason for its actions—is insufficient to get the plaintiff to the jury. Yet on this point, disturbingly, a number of circuits are now holding that such is the law, although there exists a conflict among the circuit courts, and even conflicts within certain circuits.

Disregarding nearly 25 years of this Court's precedents under Title II, a number of circuits now hold that the prima facie case and proof of pretext may still be insufficient to get to the jury. *See, Isenberg v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996):

> [D]espite [*Hicks*], we have no confidence that *Hicks* dictates to circuit and district judges, or even was intended to suggest, that every time the evidentiary record in a case could support a jury's disbelief of the employer's explanation for the pertinent employment action, no court may grant a motion for judgment as a matter of law to the employer (or grant to an employer summary judgment)". 97 F.3d at 442.

See also Walker v. Nationsbank, 53 F.3d 1548 (11th Cir. 1995) (same, over the strong dissent of Judge Frank Johnson). Other panels of the Eleventh Circuit, however, have reached the opposite result. *See, Howard v. BP Oil*, 32 F.3d 529, 527 (11th Cir. 1994) (prima facie case

plus evidence of pretext bars summary judgment); *Batey v. Stone*, 24 F.3d 1330 (11th Cir. 1994) (same). Indeed, in Isenberg, the Court noted the intra-circuit conflict:

> On this point, we worry that there is some conflict in the case law of this circuit. The conflict concerns whether a plaintiff . . . carries his burden of proof . . . by showing a basis in the record for disbelief of the employer's stated reason. The origin of the conflict is the Supreme Court's opinion in *Hicks*."

Likewise, the Fifth Circuit reached the same result in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), holding that "There may be cases in which the prima facie case and proof of pretext goes the plaintiff's way, but a judgment for the plaintiff would still be legally questionable". 75 F.3d at 994. In *Saulpaugh v. Monroe Comm. Hosp.*, 4 F.3d 134, 141 (2nd Cir. 1993), the Second Circuit reached the same incorrect result.

In contrast to the Second, Fifth and Eleventh Circuits, the Third, Sixth, Seventh, Eighth, and Ninth Circuits have remained faithful to the precedent of this Court (and their own precedent) by holding that the prima facie case plus evidence of pretext bars summary disposition. *Fuentes v. Perskie*, 32 F.3d 759 (3rd Cir. 1994); *Sheridan v. E.I. duPont de Nemours and Company, Sheridan v. E.I. DuPont deNemours*, 74 F.3d 1439 (3rd Cir. 1996) (Order granting rehearing In Banc) (same), —— F.3d —— (3rd Cir. November 14, 1996) (in banc); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082-83); *McNabola v. Chicago Transit Authority*, 10 F.3d 501, 513 (7th Cir. 1993); *Courtney v. Biosound*, 42 F.3d 414, 418 (7th Cir. 1994); *Gaworski v. ITT Commercial Finance*, 17 F.3d 1104, 1109 (8th Cir. 1994); *Wallis v. J.R. Simplot Company*, 26 F.3d 885 (9th Cir. 1994) (same); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1994). Clearly, there is a divisive split in the Circuits relative to the effect of *Hicks*.

The split in the Circiuts is truly astonishing. On the issue of sufficiency of the evidence, *Hicks* could not be

clearer: "[I]f the defendant's proffered reasons are rejected, the trier of fact may infer the ultimate fact of intentional discrimination." *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993)[6], *Batey v. Stone,* 24 F.3d 1330, 1334 (11th Cir. 1994); *Howard v. BP Oil,* 32 F.3d 520, 527 (11th Cir. 1994) ("the fact finder's rejection of defendant's proffered reasons is sufficient evidence upon which to base a judgment for the plaintiff").

In order to be legally sufficient to support a judgment for the plaintiff, the fact finder's rejection of the employer's rationale must be accompanied by "a finding of discrimination". *Hicks,* 113 S.Ct. at 2749 n.4. This is to say that a jury's rejection of the employer's stated reason is not itself equivalent to a finding of discrimination. Instead, having rejected the stated rationale, the jury must decide whether or not discrimination was more likely than not the reason for the complained of action.

McDonnell Douglas, Burdine, Aikens, and *Hicks* make clear that the prima facie case, plus evidence of pretext, will authorize a judgment for the plaintiff. Were it otherwise, the shifting burden analysis first set forth in *McDonnell Douglas* would be turned on its head. *Hicks* says only that the prima facie case plus credited evidence of pretext does not compel judgment for the plaintiff; the opinion also makes crystal clear that this quantum of evidence is *sufficient* to support a judgment for the plaintiff.

Davis presented evidence from which a reasonable trier of fact could conclude that the individual responsible for terminating her second disability leave and continuing to

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[6] As stated in *Hicks,* "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, . . . [and] upon such rejection, "no additional proof of discrimination is required." 113 S.Ct. at 2749.

reject the medical substantiation she offered had long-standing knowledge of Davis' claims against AT&T, but that she lied during her deposition, stating that she did not know of Davis claims.[7] In light of this evidence, "pretext" is a question for the jury.

In *Hicks,* this Court spoke of "a suspicion of mendacity" accompanying the trier of fact's rejection of the employer's stated reason for the termination. 113 S.Ct. at 2749. Without doubt, a key decision maker's false sworn testimony denying a key fact in the case (knowledge of the protected complaints lodged by Davis), would more than amount to a suspicion of mendacity. Accord-

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[7] The trial court explicitly considered and found admissible for purposes of summary judgment the document evidencing Eldridge's lying regarding her knowledge of Davis' claims. The Court of Appeals ruled that the evidence was not admissible since it was not properly "authenticated." This is plainly incorrect both under the Federal Rules of Evidence and governing precedent. Fed. R. Evid. 901 states that "the requirement of authentication . . . is satisfied by evidence tending to support a finding that the matter in question is what its proponent claims." In this case, AT&T admits that the document in question "was produced by Dr. Rosen's office in response to a subpoena served by AT&T." In short, AT&T admits that the document is "authentic" in the sense that it is a business record of Dr. Rosen, as submitted to AT&T and provided by AT&T to Davis. Accordingly, the authenticity of the document is not truly being challenged by AT&T. The conclusion that the document cannot be considered on summary judgment also squarely contradicts the decisions of this Court. In the seminal case on modern day summary judgment procedure, this Court explicitly held that the non-moving party is not required to produce evidence in a form that would be admissible at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Finally, Davis requested the trial court, to the extent that it concluded the document could not be considered on summary judgment, to permit additional time to depose the custodian of the records. However, since the trial court found that the document was properly before it, it had no occasion to grant the request. Clearly, if this court feels that further authentication is required, the appropriate course is to remand the case to the trial court to allow Davis to secure the necessary authentication.

ingly, the lower Court plainly erred in disposing of Davis' claim on summary judgment.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

[Filed Sep. 27, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8203

D. C. Docket No. 1:92-01972-CV-GET

ANN DAVIS,
Plaintiff-Appellant,

versus

AT&T COMMUNICATIONS,
LARRY NEWTON,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(September 27, 1996)

Before HATCHETT, Circuit Judge, HENDERSON, Senior Circuit Judge, and MILLS*, District Judge.

RICHARD MILLS, District Judge:

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* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

A longtime employee sued her former employer and her former supervisor alleging a variety of state and federal claims.

The U.S. Magistrate Judge recommended summary judgment for defendant on the employee's hostile environment sexual harassment claim but not for her claim of retaliatory discharge. The parties objected to these recommendations.

The U.S. District Judge granted summary judgment for defendant on both claims.

Plaintiff appeals.

I. FACTS

Ann Davis had worked for AT&T Communications, Inc. (AT&T) for 25 years when, in August 1990, she transferred to the job of Facilities Planner for AT&T's Atlanta office. Larry Newton interviewed Davis for the job and acted as her supervisor in Atlanta. Newton, a thirty-one year AT&T employee, was a "second-level" manager while Davis, who worked under Newton was a "first-level" manager. Although Davis claims that Newton sexually harassed her while she worked in Atlanta, she does not complain about how he acted during the hiring process.

By all accounts, Larry Newton was a very demanding supervisor. He often used a harsh and intimidating tone in the work place and bullied those who worked under him. He raised his voice during office meetings, pounded on tables, pointed fingers, and snatched documents from employees. Newton also used inappropriate language in the office. Various employees testified in depositions that he referred to female coworkers as "bitches" on approximately six occasions since 1991. Newton also apparently used the term "nigger" once or twice during the same time period and referred to his supervisor Jackie Wilson, a black male, as "Jackie boy" on occasion. Finally, Newton is reported to have used the terms "queer" and "faggot" at least one time, maybe more.

Davis bases her sexual harassment claim on several specific instances of Newton's conduct. Between August 1990 and February 1991, Davis occasionally overheard Newton use the terms "bitch" and "nigger" when referring to others. Davis never heard Newton refer to her as a bitch,[2] but one coworker reported that Newton had called Davis a "bitch" once.[3] Davis did not feel, however, that during the period from August 1990 to early 1991, anything illegal was done to her by Newton or anyone else at AT&T. Other than "bitch," Newton never used any sexually improper language.

These sporadic, isolated comments continued until March 1991. In March 1991 Davis began to feel that Newton was sexually harassing her. The alleged harassment continued until early August 1991, when Davis went on disability leave.

On March 1, 1991, Davis and Newton met to discuss her performance appraisal. During the meeting, Davis told Newton that because she was concerned about downsizing she wanted to know exactly what he expected from her.[4] Newton responded angrily that to receive the highest performance rating, "[b]y God, you've got to do it better than anybody out there." [5]

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[2] Davis makes much of Newton's use of the term "bitch," but he never called her a "bitch" to her face. Once, Newton used the term "bitch" in her presence and in reference to her. He said: "I'm sick and tired of people coming in here and telling me what a bitch you are." Davis Dep. at 89.

[3] Mary Chromack, an administrative assistant to Mr. Wilson, testified in her deposition that Newton called Davis a bitch once, but she didn't have "any idea" what the context of the statement was, it was "a generic statement, more or less." Chromack Dep. at 8.

[4] Davis also expressed concern that portions of her appraisal had not been completed. The incomplete portions of the appraisal, however, related to work she did in New Jersey.

[5] Davis Depo. at 86.

After the March 1, 1991 meeting, Davis felt that Newton became easily aggravated and was "surly" toward her. Davis also complained that Newton became very intimidating. Sometimes Newton would take work from Davis and assign it to other workers. Davis also felt that Newton was withholding information from her and meeting with small groups of male employees during cigarette breaks.

In early June 1991, Davis again met with Newton. At this meeting, Newton raised his voice and pounded on the table. Aside from being overly loud and emphatic, Newton did not use vulgar language or touch Davis, and Davis did not feel physically threatened.

In April 1991, Jackie Wilson decided to move Newton to a different work group on a different floor of the building that housed AT&T's offices. This reassignment was intended to become permanent, but was temporary at first. By May 1, 1991, Newton had no responsibility as a second level manager for Davis' work group. Arnie Haire was appointed as Newton's interim successor.

In May and June of 1991, Davis told Diane Sanchez, an acting district manager, about her problems with Newton. Davis did not ask Sanchez to do anything and Davis told her that she was going to talk to Wilson about her problems. Sanchez was aware that Newton had used the term "bitch" in the office. As a result of Davis' complaints, Sanchez showed a diversity video to all the second level managers and told Newton that derogatory comments would not be tolerated in the workplace.

On June 13, 1991, Davis talked to Jackie Wilson. Davis told Wilson that Newton had used the term "bitch" in her presence. Wilson asked for time to investigate, and Davis agreed. Wilson's investigation included meeting with Newton and with his subordinates. The meetings revealed that serious communication problems existed and that Newton was a difficult person to deal with, but they did not corroborate Davis' claims.

On August 8, 1991, Wilson contacted AT&T EEO manager Beth Jones and told her about Newton. Two days later, Davis did the same. She told the EEO department that all she wanted was for the harassment to stop.

Gina Riley, a member of AT&T's EEO department, conducted the corporate investigation of Davis' complaint. Riley interviewed employees from Newton's former work group. From them, she learned that Newton had used intimidation as a management tool and had used the terms "bitch" and "nigger." This conduct violated AT&T's code of conduct. In fact, Riley concluded that Newton had committed gender harassment.

On December 10, 1991, Riley conferred with Davis about her findings. At that meeting, Davis demanded that AT&T pay her medical bills, provide unspecified damages, compensate her for stress and loss of enjoyment of life, and guarantee that she would never have to work in the same building with Newton.

Three days later, Wilson met with Newton and informed him of the EEO department's findings. Wilson told Newton that he faced discipline and directed Newton to attend diversity training classes and to instruct his peers and subordinates on the subject of "the virtues of diversity." As a result of the investigation, Newton's 1991 performance appraisal was lowered. The decreased performance appraisal cost him approximately $6,000 in annual income.

On the same day that Wilson reported Davis' allegations to AT&T's EEO office, Davis went on disability leave for work-related depression. After a period of leave, AT&T ordered Davis to return to work, but with significantly reduced responsibilities and with a new supervisor. On January 22, 1992, 19 days after being ordered to return to work, Davis filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).

On June 8, 1992, Davis was again granted disability leave. In October 1992, AT&T ordered Davis to submit

to another medical examination, this time with a new doctor. The new doctor found Davis able to return to work, although Davis' old doctor continued to find her disabled.

After receiving these conflicting reports, the disability case manager relayed the information to Davis' supervisor, Paul Gibb. On December 11, 1992, Gibb wrote to Davis directing her to return to work by December 28, 1992. At her December 15, 1992 deposition for this case Davis testified that she could not work for AT&T in Atlanta but could work for another employer in North Carolina.[6] Gibb wrote Davis a second time on December 28, 1992. He ordered her to return by January 4, 1993 and offered her the option of taking a job in North Carolina. Davis again refused to return and, on January 8, 1993, AT&T fired her for job abandonment.

III. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Wilderness Society v. Alcock*, 83 F.3d 386, 389 (11th Cir. 1996). Under Fed. R. Civ. P. 56(c) summary judgment is proper if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To make these determinations, we view the evidence in the light most favorable to the nonmoving party. *Wilderness Society*, 83 F.3d at 389.

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[6] The following exchange occurred between AT&T's counsel and Davis:

> Question: And it's your position that you're still not ready to return to work in Atlanta?
>
> Answer: No, I'm not.
>
> Q: With any employer?
>
> A: That's right.
>
> Q: Can you work now for another employer in, for example, North Carolina?
>
> A: Yes.

IV. HOSTILE ENVIRONMENT CLAIM

A.

Davis asserts that AT&T's Atlanta office was a hostile and abusive work place. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994), makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2 (a)(1). It is well established that workplace harassment based on race, color, religion, sex, or national origin may constitute discrimination with respect to "terms, conditions, and privileges of employment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Title VII outlaws two types of sexual harassment: *quid pro quo* harassment and hostile environment harassment. *See generally Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1989).

To establish a prima facie case of hostile environment sexual harassment, a plaintiff must show: (1) that she is a member of a protected group; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based on gender, and (4) that the harassment affected a term or condition of her employment. *Cross v. State of Alabama*, 49 F.3d 1490, 1505 (11th Cir. 1995) (*citing Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982)).

"Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected class-member's opportunity to succeed in the workplace." *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (10th Cir. 1996). Harassment is sufficiently severe and pervasive to support a claim under Title VII if "the workplace is permeated with 'discriminatory intimidations, ridicule, and insult' that is 'sufficiently severe or pervasive to

alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993) (quoting *Meritor*, 477 U.S. at 65, 67). Whether the conduct alleged is sufficiently severe and pervasive is determined on an objective basis, by reference to "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 114 S. Ct. at 370.

B.

Both the magistrate judge and the district judge concluded that Davis had not been subjected to an objectively hostile and abusive work environment. Davis argues on appeal: (1) that the question of whether a work environment was sufficiently hostile and abusive as to offend a reasonable person is a matter to be decided by the jury and (2) that the conduct alleged in this case meets the standard recited above. AT&T argues: (1) that the district court correctly evaluated the evidence in this case and (2) that AT&T took prompt remedial action which shields it from liability for sexual harassment.

Davis argues that the question of whether conduct is sufficiently severe and pervasive to create an objectively hostile workplace is a question that should always be left to a jury. We disagree. Fed. R. Civ. P. 56(c) allows summary judgment on any issue if the material facts are undisputed and the result is dictated by law. The facts supporting a claim of sexual harassment may be undisputed and those undisputed facts may be insufficient as a matter of law to prove that the working environment was objectively hostile.[7] Therefore, summary judgment may be proper in a sexual harassment case.

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[7] In support of her theory, Davis cites several cases that proceeded through trial. *Cross v. State of Alabama*, 49 F.3d 1490 (11th Cir. 1995); *Spicer v. Commonwealth of Virginia*, 44 F.3d

We turn now to the undisputed material facts of this case and we find them insufficient as a matter of law to support a claim of sexual harassment. We address Newton's abusive behavior and his vulgar language separately. We find nothing in the record to substantiate Davis' claim that Newton directed his hostile, intimidating behavior only at women. Instead, Newton directed his hostility and abuse at both male and female workers—only sparing a few male friends. Therefore, Newton's intimidation and abuse of his subordinates was not discriminatory. *See Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000 (10th Cir. 1996) (concluding that incidents like door slamming, spilling drinks and invading a desk did not support a claim of sexual harassment, although physical abuse, explicit cartoons directed at the plaintiff, and a stream of sexually offensive vulgarity unquestionably constituted sexual harassment).[8] Davis suggests that Newton's intimidating behavior was a product of disdain for women, a conclusion based on Newton's use of the term

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218, 224 (4th Cir. 1995), *on reh'g en banc*, 66 F.3d 705 (4th Cir. 1995); *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994). These cases involved challenges to a jury's or a judge's weighing of evidence and determinations of credibility; therefore they involved significantly more deferential review than this case. *Spicer*, 44 F.3d at 224, 227 (noting that review was for clear error and that a central finding rested on the district judge's ability to view the demeanor of the witnesses); *Webb*, 30 F.3d at 530 ("Whether the evidence supported Beardsley's claim or Webb's defenses depended largely on the credibility of the witnesses and the inferences the jury could reasonably draw from the facts."). These cases also involved facts that would have made summary judgment improper as a matter of law. They do not support Davis' theory.

[8] Davis argues that workplace hostility and intimidation alone can support a claim under Title VII. Davis relies on *Bell v. Crackin Good Bakers*, 777 F.2d 1497 (11th Cir. 1985). *Bell* was not a hostile environment case. Instead, it involved a disparate treatment claim by a worker whose supervisor engaged in a plan to force her to resign. *Id.* at 1499. This plan involved harassing behavior such as yelling, unreasonable job demands, and calling the plaintiff "a pimp for the office." *Id.*

"bitch." But the record shows that Newton's aggressive behavior toward Davis occurred in response to her repeated questioning regarding subjects such as whether she could move her desk to a better location and what Newton expected from her as a worker. The undisputed facts do not show that from his use of the term "bitch," he was motivated by discriminatory animus.

We now must decide whether Newton's use of crude language in the workplace can by itself sustain Davis' claim of sexual harassment. The occasional use of offensive or discriminatory epithets does not usually give rise to a claim of harassment under Title VII. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (cited with approval in *Meritor*, 477 U.S. at 67). Instead, the work environment must be "permeated with 'discriminatory intimidations, ridicule, and insult.' " *Harris*, 114 S. Ct. at 370.

In some circumstances, vulgar language alone may support a claim of sexual harassment. *Compare Callanan v. Runyun*, 75 F.3d 1293, 1295-96 (8th Cir. 1995) (finding insufficient evidence of sexual harassment where the plaintiff had "periodic negative personal encounters with her supervisors and peers" and was once referred to as a bitch) *with Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 902-04 (11th Cir. 1988) (affirming a finding of sexual harassment where coworkers called the plaintiff a bitch and a whore in the presence of customers and ridiculed her attire and appearance); *see also Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (concluding that use of the term "bitch" does not lead to an automatic conclusion of gender bias or sexual harassment). Some words by their nature convey a demeaning, derogatory message and, if used with sufficient frequency in the workplace, may support a claim of sexual harassment. *See Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000 (10th Cir. 1996).[9]

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[9] The Tenth Circuit cites a variety of cases for the proposition that terms such as "whore," "floor whore," "curb whore," "bitch"

Other words, however, are ambiguous and the context in which they are used determines whether they support a claim of sexual harassment. *See Galloway*, 78 F.3d at 1168.

In this case, the key word is "bitch." If that term, in the context Newton used it, conveys a strong enough message of gender bias, then perhaps summary judgment was improper. Unfortunately, however, while we know a great deal about the frequency with which Newton used the ambiguous term "bitch" (with such modifiers as "dumb" or "stupid" [10]), we know nothing about the exact context in which Newton used this term. By neglecting to present evidence that Newton used the term "bitch" in a sexist or objectively demeaning manner, Davis failed to meet one element of the prima facie case for a hostile environment claim.[11]

Even if Newton did use the term "bitch" in the most hostile and demeaning manner, it did not make Davis' work environment one that a reasonable person could not bear. *See Galloway*, 78 F.3d at 1168, *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431 (7th Cir. 1995); *Callanan*, 75 F.3d at 1298; *Gross v. Burggraf Construction Co.*, 53 F.3d 1531 (10th Cir. 1995). Newton's use of the term was sporadic and infrequent. Newton never addressed Davis as "bitch," and did not use any other

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and more vulgar terms are inherently discriminatory. We agree, with the exception of the term "bitch" when it is not accompanied by any of the other terms. *See also Huddleston*, 845 F.2d at 902 (use of the terms bitch and whore).

[10] We do not place great weight on Newton's occasional use of these modifiers. *See Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1543 (10th Cir. 1995) ("The term 'dumb' is gender-neutral.").

[11] From what evidence the record contains, it is apparent that Newton did not use the term as a code-word for negative "feminine" traits, *See Galloway*, 78 F.3d at 1168, or to remark about coworkers' maternal characteristics.

sexually improper language.[12] Newton did not physically abuse Davis or ever touch her. Therefore, Davis has failed to meet the minimum she must show under *Harris.* 114 S.Ct. at 371.

Davis urges us that summary judgment was improper because AT&T concluded in its own internal investigation that Newton violated company policy and committed acts of gender harassment. This argument overlooks the fact that Title VII and AT&T's policy are not coextensive. AT&T's policy apparently is more demanding than Title VII. AT&T wisely disciplined Newton for his rude and inappropriate behavior. Sexual harassment under Title VII is defined by Congress, the courts, and the EEOC. What matters in this case is how the undisputed evidence compares to the legal standards established by these entities, not AT&T's evaluation of Newton's conduct, which was created for a different purpose.[13]

C.

The district court properly granted summary judgment on Davis' hostile environment claim because the events alleged did not constitute an objectively hostile and abusive work environment. We pause briefly to discuss AT&T's alternate ground for affirmance—that even if Newton's conduct was objectively hostile and abusive, AT&T took prompt remedial measures and is thus shielded from liability under Title VII. Davis argues that AT&T's remedial action was insufficient because Newton was not fired or demoted. Employers are liable for hostile en-

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[12] This case is significantly different from cases such as *Huddleston* in which coworkers directly and repeatedly addressed the plaintiff with derogatory epithets. *See* 845 F.2d at 902. In this case, Newton never addressed Davis as "bitch."

[13] This does not mean that employers' conclusions that they violated Title VII or employers' admissions regarding conduct involved in claims of sexual harassment are immaterial. We simply point out that an employer's conclusion that something violated company policy is not equal to an admission of liability under Title VII.

vironment sexual harassment only if the plaintiff proves that "the employer knew, or should have known, of the harassment and failed to take remedial action." *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988). The standard for deciding whether an employer has taken sufficient remedial action is a negligence standard. *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990). "The employer acts unreasonably if it either delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring." *Id.* Under such a standard, an employer is not obliged to fire or demote all people charged with sexual harassment. Instead, the employer must take action reasonably calculated to prevent the misconduct from happening again. *See Steel v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1313 (11th Cir. 1989); *Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572 (10th Cir. 1990) (describing responses found appropriate by various courts).

V. RETALIATION CLAIM

A.

In the district court, the magistrate judge recommended that summary judgment be denied on Davis' retaliation claim. The district judge, however, granted summary judgment after finding that AT&T had introduced evidence of a legitimate nondiscriminatory reason for discharging Davis (that she refused to return to work when given an opportunity to do so) and that Davis had not introduced sufficient evidence to raise a question regarding whether the proffered reason was a pretext.

To prove a prima facie case of retaliation, a plaintiff must show: "(1) that she engaged in statutorily protected activity, (2) that an adverse employment action occurred, and (3) that the adverse employment action was causally related to the plaintiff's protected activities." *Coutu v. Martin County Board of County Commissioners*, 47 F.3d.

1068, 1074 (11th Cir. 1995). After the plaintiff establishes her prima facie case, the burden shifts to the defendant to produce evidence of "non-retaliatory reasons for the employment actions." *EEOC v. Reichhold Chemicals, Inc.*, 988 F.2d 1564, 1572 (11th Cir. 1993). "The plaintiff can refute these allegations by proving that they are pretextual." *Id.*; *see also Meeks v. Computer Assocs. International*, 15 F.3d 1013, 1021 (11th Cir. 1994).

Under our liberal standards, *see Reichhold Chemicals, Inc.*, 988 F.2d at 1572, Davis has established a prima facie case of retaliation. In response, AT&T offered a non-discriminatory reason for firing her: that she abandoned her job. Thus, the burden shifts back to Davis to show that AT&T's reason is a pretext.

B.

Davis' claim for pretext rests largely on a single word. She argues that a document containing the word "lawsuit" proves that AT&T's disability manager knew that Davis had filed suit when she initiated procedures to terminate the second disability leave. After careful examination, we conclude that the documentary evidence supporting Davis' claim of pretext is inadmissible, and that even if it could properly be considered under Fed. R. Civ. P. 56, Davis' deposition testimony negated any claim of pretext.

Davis' pretext claim rests on an exhibit to Davis' affidavit in support of her opposition to AT&T's motion for summary judgment. Davis states that the exhibit is a referral slip from the office of the doctor AT&T sent her to when she was on her second disability leave. In a section of the slip captioned "Chief Complaint" someone wrote: "Out of job x several (since June). Lawsuit? Can't get along [with] supervisor. Adj. disorder. Back to work? On disability." In her affidavit, Davis states that the exhibit containing this language is "[a] true and accurate copy of the referral slip created by Dr. Rosen's office at the time my appointment was arranged by Ms.

Eldridge . . . ." Davis argues that the slip is evidence that Eldridge, the AT&T disability manager who managed Davis' disability claim, knew about this lawsuit. From her inference that Eldridge knew about the lawsuit, Davis argues that AT&T must have been motivated by retaliatory intent when it terminated her disability leave and ordered her back to work.

The slip, however, is unauthenticated and inadmissible. The Federal Rules of Evidence require that documentary evidence be supported by sufficient evidence to show that it "is what its proponent claims." Fed. R. Evid. 901(a). The only proof of the note's authenticity is Davis' affidavit stating that it is a true and accurate copy of the note. We believe that the exhibit is a true and accurate copy of something. We do not know, however, whether that something is what Davis claims it is. And we cannot allow a claim of pretext to be supported by mere speculation.

Even if this unauthenticated document is admissible, its value is far outweighed by Davis' own deposition testimony. Davis argues that AT&T fired her in retaliation for her filing a lawsuit against AT&T. From her deposition testimony, it is clear that Davis refused to accept a reassignment within AT&T. She even rejected offers to place her in North Carolina, where she was living at the time. By the time Davis was fired, her disability leave was no longer certified. She refused to work. When AT&T fired her after she refused to take a job with the company in a location she desired, Davis claimed AT&T acted with retailatory intent. That claim is simply not plausible.

VI. CONCLUSION

We find no genuine issue of material fact and we conclude that AT&T was entitled to judgment as a matter of law on Davis' claims of hostile environment sexual harassment and retaliation.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:92-CV-1972-GET

ANN DAVIS,

Plaintiff,

vs.

AT&T COMMUNICATIONS, LARRY NEWTON,

Defendants.

MAGISTRATE JUDGE'S REPORT

PART ONE

HISTORY OF THE CASE

This is a civil rights employment discrimination case under, *inter alia*, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) filed by a white female, whose employment with AT&T Communications (hereinafter "AT&T") was terminated in January, 1993. Specifically, plaintiff claims that (1) AT&T is liable for alleged sexual harassment by Larry Newton, which harassment created a hostile work environment, in violation of Title VII; (2) AT&T discriminated against her on the basis of sex in certain terms and conditions of employment [1], in violation of Title VII; and (3) AT&T dis-

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[1] Specifically, plaintiff alleges that her job duties were never fully defined and communicated to her, and that other information necessary to the performance of her job was withheld from her. In contrast, she alleges that male employees were not so treated.

charged her in retaliation for filing a sex discrimination lawsuit, also in violation of Title VII. She also contends that: (4) AT&T discharged her because she exercised her rights under the provisions of AT&T's employee benefit plan, in violation of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1140); (5) AT&T discharged her on the basis of her emotional/mental disability, in violation of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12112); and (6) AT&T and Larry Newton are both liable for intentional infliction of emotional distress under Georgia law.[2]

Presently pending before the undersigned are the Motions for Summary Judgment filed by defendants AT&T Communications [Doc. 57] and Larry Newton [Doc. 63][3], the plaintiff's response [Doc. 71], AT&T's reply [Doc. 75], and each party's supplemental briefs [Docs. 84, 85].[4]

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[2] This Court is compelled to conclude that Larry Newton is a proper defendant only as to the intentional infliction of emotional distress claim. A Title VII plaintiff may only obtain relief against his employer, not against the employer's employees who allegedly committed acts of discrimination or harassment. *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); *Smith v. Capitol City Club*, 850 F. Supp. 976 (M.D. Ala. 1994); 42 U.S.C. §§ 2000e (b), 2000e-2. Similarly, the provisions of the A.D.A. contemplate that a plaintiff may only obtain relief against her employer. *See* 42 U.S.C. § 12111 (2) & (5). Although there are some instances where an individual may be a defendant in a § 1140 ERISA action, *see Swanson v. U.A. Local 13 Pension Plan*, 779 F. Supp. 690 (W.D.N.Y. 1991), there is no indication from the plaintiff's amended complaint [Doc. 53] that he is naming Newton in his ERISA action.

[3] In his motion, Newton merely adopted in its entirety AT&T's Motion for Summary Judgment and memorandum in support thereof.

[4] The plaintiff filed a Motion to Strike AT&T's supplemental reply brief [Doc. 86] as untimely. In an Order issued simultaneously herewith, this Court hereby denies the plaintiff's motion.

PART TWO

THE ISSUES

A. WHETHER AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S SEXUAL HARASSMENT HOSTILE ENVIRONMENT CLAIM

B. WHETHER AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S OTHER SEXUAL HARASSMENT CLAIMS

C. WHETHER AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S TITLE VII CLAIM OF RETALIATORY DISCHARGE

D. WHETHER AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S ERISA CLAIM

E. WHETHER AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S AMERICANS WITH DISABILITIES ACT CLAIM

F. WHETHER EITHER DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS

1. WHETHER AT&T MAY BE HELD LIABLE FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

2. WHETHER LARRY NEWTON MAY BE HELD LIABLE FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

PART THREE

THE UNDISPUTED FACTS

The defendant has filed a Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried, and the plaintiff has filed a response thereto. Unless other-

wise indicated, this Court draws the undisputed facts from the defendants' Statement.[5]

1. AT&T has a disability leave policy under which an employee may receive her full pay and need not report to work, if that employee is under a physician's care, and the physician certifies that the employee is disabled and denominates the duration of the disability. Defendant's Exhibit 27, p. 9.

2. At all relevant times herein, AT&T maintained a written policy prohibiting sexual harassment and sex discrimination. Under the policy, employees may bring allegations of harassment or discrimination to the attention of mangement personnel or AT&T's EEO office; and if, after an investigation, violations of the policy are confirmed, AT&T will take corrective action. AT&T reviews its sexual harassment policy with its employees on a yearly basis. Affidavit of Carlos Cantu; Deposition of Gina Riley, p. 74.

3. Plaintiff began her employment with AT&T in 1965 in Hendersonville, North Carolina. Plaintiff's Deposition, (hereafter "P.D.") pp. 14-16.

4. In August, 1990, while plaintiff was working for AT&T in Bedminster, New Jersey, she was offered and accepted the position of Facilities planner in the T-3 group of the Network Services Division (NSD) at AT&T's Atlanta location, in which position she would be supervised by Larry Newton. Plaintiff does not allege she was mistreated or harassed by Newton during the interview and selection process. P.D., pp. 21-28.

5. During plaintiff's first seven months in her new job (i.e. through the end of February, 1991), plaintiff heard Newton refer to various other female employees as "bitch," "stupid bitch," and "dumb bitch." Newton's use of these

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[5] This Court must deem as admitted those facts in the defendants' Statement which are uncontroverted by the plaintiff. L.R. 220-5 (b) (2) (N.D. Ga.).

epithets was offensive to plaintiff, and on multiple occasions, plaintiff asked Newton to stop making such comments. P.D., pp. 128-129; Affidavit of Plaintiff, § 15.

6. On or about March 1, 1991, plaintiff met with Newton to discuss her job performance appraisal. Newton appraised her as having "fully met objectives" of her job. Defendant's Exhibit 1; P.D., pp. 134-135.

7. On at least one occasion while talking to the plaintiff, Newton raised his voice, and, in plaintiffs view, was "extremely verbally abusive." P.D., p. 82.

8. In May, 1991, Newton's supervisor, Jackie Wilson, transferred Newton to a temporary assignment in another work group on a different floor. The transfer was not a remedial measure in response to any complaints of sexual harassment by the plaintiff. Elmer Haire was placed in charge of all of Newton's groups. Deposition of Jackie Wilson, pp. 18-20, 52-55; Defendant's Exhibit 3.

9. In May and June, 1991, plaintiff met with her District Manager, Diane Sanchez, to discuss her concerns regarding Newton and his use of derogatory terms about women in the workplace. Sanchez had heard such complaints from other employees as well. P.D. pp. 194-195.

10. At some undetermined time, but after hearing some of the complaints about Newton, Sanchez met with Newton and counseled him that derogatory comments in the workplace would not be tolerated. Deposition of Diane Sanchez, pp. 8-10.

11. On June 6, 1991, plaintiff met with Newton to discuss her job duties and expectations. During the meeting, Newton raised his voice and pounded on the table. He did not touch or physically detain the plaintiff; nor did he make sexual advances toward the plaintiff. P.D., pp. 88-93.

12. On June 13, 1991, plaintiff met with Wilson and discussed her concerns about Newton's alleged sexual harass-

ment (i.e. usage of derogatory language about women and profanities). During this meeting, plaintiff informed Wilson of Newton's use of the word "bitch" in her presence.

13. After that meeting, Wilson met with Newton and discussed plaintiff's allegations.[6]

14. As part of AT&T's apparent investigation of plaintiff's allegations, Wilson also conducted two "skip-level sessions"[7] with several employees, during which he solicited comments and opinions about the company's organization and management. He did not raise the issue of the allegations against Newton during those sessions; and none of the employees participating therein complained about Newton. As a further part of the apparent investigation, Wilson asked three other supervisors who reported to, or worked with, Newton if any of them had heard Newton use profanity as alleged. They responded that Newton was a tough manager, but none had heard him use the alleged derogatory language. Deposition of Jackie Wilson, pp. 41-42, 47-48.

15. On August 8, 1991, Wilson contacted AT&T's EEO manager Beth Jones and informed her of plaintiff's complaints against Newton, and the results of his investigation.

16. Also on August 8, 1991, plaintiff was granted a leave of absence from her employment on the basis of a stress-related disability. On August 21, 1991, Gary Dudley, Ph.D., a clinical psychologist, certified that the plaintiff

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[6] Wilson testified in his deposition that Newton denied using the word "bitch." Newton testified in his deposition that he did not deny using the word. Deposition of Wilson, pp. 37-38; Deposition of Newton, pp. 64-65.

[7] A skip level session is a meeting in which someone in a management position talks with employees at least two levels lower in the hierarchy in order to obtain those employees' honest assessment of any problems in the workplace.

was disabled by "severe agitation and reactive depression;"and, accordingly, she began receiving benefits under AT&T's disability plan. Defendant's Exhibit 10.

17. On August 10, 1991, plaintiff contacted AT&T's EEO office and filed a sexual harassment complaint against Newton based on his alleged conduct.

18. At some point shortly thereafter, plaintiff moved back to North Carolina.

19. From August, 1991 until early December, 1991, AT&T's EEO officer Gina Riley conducted an investigation into plaintiff's complaint, during which she interviewed several employees in the T-3 work group.

20. Based on her investigation, Riley found that Newton had engaged in "gender harassment [8], that other employees had heard him more than once using sexist and racist epithets such as "bitch" and "nigger," and that he freely intimidated employees whom he supervises. Based thereon, Riley concluded that Newton had violated AT&T's Code of Conduct; and she recommended that Newton be required to attend a diversity workshop and a diversity awareness session, that he be required to teach what he learned at the session to others, and that he be warned that a further violation could result in dismissal. Plaintiff's Exhibit 1 to the Response; Plaintiff's Exhibit 6.

21. On December 13, 1991, Wilson counseled with Newton, and gave him a memorandum which advised him that he had violated the AT&T Code of Conduct, and that if he committed any further violations, he would face addi-

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[8] The evidence is devoid of a written record from Riley as to what acts by Newton constituted "gender harassment." That finding appears in Riley's December 6, 1991 memorandum to Bill Barkley (Plaintiff's Exhibit 1 to her response), but not in the document which summarizes the interviews conducted during the investigation and reflects Riley's recommendations of discipline. (Plaintiff's Exhibit 6).

tional disciplinary action, including demotion or termination. Plaintiff's Exhibit 7.

22. As further discipline, Wilson also lowered Newton's 1991 performance appraisal rating and merit award. As a result of the lowered performance rating, Newton became ineligible to receive an annual bonus, which deprived him of as much as $6,000 additional income. Deposition of Wilson, pp. 81-82; Deposition of Kathy Waller, pp. 27-28.

23. Based on Dr. Dudley's November 18, 1991 letter to AT&T (in which he wrote that plaintiff "is certainly capable of performing some type of work,") AT&T ordered the plaintiff to return to work. On January 3, 1992, plaintiff returned towork at AT&T and was assigned to a position with a significantly reduced work load and no supervisory responsibility. Her new supervisor was Paul Gibb. Defendant's Exhibit 13; Deposition of Paul Gibb, p. 8.

24. On January 22, 1992, plaintiff filed a charge of sex discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC). In her supporting statement, she described alleged sexual harassment and sex discrimination to which she was allegedly subjected by Larry Newton, and she also made a general allegation of retaliation against AT&T. Defendant's Exhibit 28.

25. From the time that plaintiff returned to work until she again obtained another disability leave, plaintiff had little or no contact with Newton; and Newton did nothing to her which she considered as sexual harassment or discrimination. P.D. pp. 265-66, 340-41.

26. On June 8, 1992, plaintiff was again granted a disability leave, on the basis of her complaint of conditions similar to those which precipitated her first leave. Dr. Dudley again certified that she was disabled on the basis of an adjustment disorder and anxious mood. Defendant's Exhibit 10, p. 3.

27. On July 16, 1992, plaintiff filed the instant lawsuit. In her original complaint, she raised claims of sex discrimination and sexual harassment under Title VII, and intentional infliction of emotional distress.

28. In October, 1992, while plaintiff was still certified as disabled by Dr. Dudley, plaintiff was directed by her disability case manager Carol Eldridge to submit to a disability evaluation by psychiatrist Ronald Rosen, M.D.; and, on October 22, 1992 and November 23, 1992, at AT&T's expense, Dr. Rosen examined the plaintiff. Based on these two examinations, Dr. Rosen determined that the plaintiff could return to work. Defendant's Exhibit 21; Deposition of Carol Eldridge, pp. 21-24.

29. On November 16, 1992, Dr. Dudley re-certified that the plaintiff remained disabled and unable to work. Defendant's Exhibit 10, p. 5.

30. On November 23, 1992, the plaintiff, by her own choosing, was evaluated by Karl V. Schroeder, M.D., a psychiatrist in Asheville, North Carolina. Dr. Schroeder also declared that the plaintiff was totally disabled for work at AT&T for an indefinite period due to work-related depression. Documentation of Dr. Schroeder's conclusions was forwarded to the disability department at AT&T, and received by Eldridge. Defendant's Exhibit 9; Attachment to Exhibit 17 to Plaintiff's Affidavit.

31. After receiving the evaluation from Dr. Rosen and Dr. Schroeder, Eldridge concluded that plaintiff could no longer be certified as disabled. Eldridge communicated his determination to Paul Gibb; and on December 11, 1992, Gibb wrote a letter to plaintiff directing her to return to work on December 28, 1992. Plaintiff failed to appear for work on the appointed date as directed, and, in response thereto, Gibb wrote plaintiff another letter, ordering her to return to work on January 4, 1993, and also advising her of an alternative: she could also apply for an available management position with AT&T in

Rocky Mount, North Carolina. Deposition of Gibb, p. 42; Defendant's Exhibit 18.

32. On January 5, 1993, Carol Eldridge wrote a letter to plaintiff explaining that, based on Dr. Rosen's conclusion, AT&T no longer considered the plaintiff as properly certified as disabled. In that letter, Eldridge also cited in further support of AT&T's position her December 28, 1992 receipt of a report from Dr. Dudley which also concluded that plaintiff was able to return to work with some modifications.[9] She also wrote therein that AT&T rejected Dr. Schroeder's conclusion on the grounds that it did not constitute evidence of total disability. Attachment to Exhibit 17 to Plaintiff's Affidavit (Eldridge's letter); Defendant's Exhibit 10, p. 6 (Dudley's report).

33. Plaintiff refused to return to work in response to Gibb's second letter. Accordingly, on January 11, 1993, Gibb wrote to plaintiff and advised that, as a consequence of her failure to report to work as ordered, plaintiff's employment with AT&T was terminated as of January 8, 1993. Defendant's Exhibit 20.

PART FOUR

CONCLUSIONS OF LAW

1. AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S SEXUAL HARASSMENT CLAIM

AT&T contends (1) that Newton committed no acts of alleged sexual harassment against plaintiff within 180

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[9] Plaintiff contends, and Dudley testified, that his December, 1992 report was intended to characterize plaintiff's status as of the fall of 1991. Dudley testified that, in or about December, 1992, someone in AT&T's insurance office called him and advised that AT&T did not have a copy of the form reflecting Dudley's 1991 opinion that plaintiff could return to work, and asked him to complete and transmit a new form which would duplicate his 1991 decision. Deposition of Gary Dudley, pp. 104-5.

days immediately preceding the plaintiff's filing of her charge of sex discrimination with the EEOC, and, hence, the plaintiff's sexual harassment claim was barred as untimely. 42 U.S.C. § 2000e-5(e); *see Wright v. Revere Copper and Brass, Inc.*, 836 F.2d 505, 507 (11th Cir. 1988); and (2) assuming the plaintiff's claim was not untimely, the claim failed to allege "conduct" which established a cognizable claim of sexual harassment under the Eleventh Circuit standard as set out in *Henson v. Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982).

Timeliness:

Title VII requires that parties aggrieved by discriminatory acts file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory employment practice. 42 U.S.C. § 2000e-5(e). Thus, in order for a charge to be timely filed, the plaintiff was obliged to allege the commission of at least one discriminatory act which occurred within 180 days immediately preceding the day she filed her EEOC charge. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889 (1977); *Wright v. Revere Copper and Brass, Inc.*, 836 F.2d 505, 507 (11th Cir. 1988). In a sexual harassment case, the plaintiff must allege the commission of at least one incident of harassment which is a part of a continuing pattern of harassment, and which occurred within 180 days immediately preceding the filing of the EEOC charge. *See Waltman v. International Paper Co.*, 875 F.2d 468, 474-475 (5th Cir. 1989).

Based on the plaintiff's sworn affidavit filed contemporaneously with the plaintiff's response, this Court is compelled to conclude that the plaintiff has created a disputed issue of material fact as to whether, subsequent to July 26, 1991 (i.e. 180 days preceding the date on which she filed her EEOC charge, January 22, 1992), she continued to be a victim of alleged sexual harassment perpetrated by Newton prior thereto. Specifically, she has

alleged that, despite Newton's apparent transfer to another work group in May, 1991, Newton often remained at plaintiff's worksite until she obtained her disability leave on August 8, 1991, that he continued to treat her in a rude and abusive fashion, and that shortly after plaintiff was granted her disability leave, Newton telephoned the plaintiff at home and spoke to her in a menacing voice. Thus this court is compelled to conclude that a finder of fact considering such evidence, in combination with Newton's alleged harassment prior to May, 1991, could infer that Newton continued to harass the plaintiff based on her gender through August, 1991; and that AT&T did not take sufficient remedial action to stop such harassment (at least until after plaintiff obtained her disability leave). *See Waltman, supra.*

The Merits

In order to establish a claim of hostile environment sexual harassment under Title VII, the plaintiff must prove (1) she is a member of a protected class; (2) she was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Henson v. City of Dundee*, 682 F.2d 897, 902-905 (11th Cir. 1982). To be actionable, the alleged harassment must be sufficiently severe and pervasive to create "an objectively hostile or abusive work environment —an environment that a reasonable person would find hostile or abusive." *Harris v. Forklift Systems, Inc.*, —— U.S. ——, 114 S.Ct. 367, 126 L.Ed.2d 295, 302 (1993).

The undisputed evidence shows the Newton used the word "bitch" and other epithets in the workplace, and that, in the presence of the plaintiff, he raised his voice, pounded on a table, and referred to other female em-

ployees as "bitches." However, the undisputed evidence also shows that Newton never called the plaintiff a "bitch" in her presence. Based thereon, and based on the evidence as a whole, this Court is compelled to conclude that the plaintiff has failed to show that the work environment at AT&T of which she complains constituted a hostile or abusive work environment within the meaning of Title VII. To be sure, it might have been, on occasion, an offensive and perhaps intimidating one in which one supervisor occasionally raised his voice, lost his temper, and uttered epithets which offended the plaintiff. However, such a work environment does not constitute one which a reasonable person would find hostile or abusive, and hence does not state a claim of sexual harassment actionable under Title VII. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not affect the terms and conditions of employment to a sufficiently significant degree to violate Title VII).

Accordingly, AT&T is entitled to summary judgment on the plaintiff's sexual harassment claim.

2. AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S OTHER SEX DISCRIMINATION CLAIMS

Notwithstanding her attempts in her summary judgment response to show several instances of disparate treatment because of sex, plaintiff's complaint, and the amendments thereto, in fact raise only two specific sex discrimination claims: (1) that her job duties were never fully defined and communicated to her; and (2) that other information necessary to the performance of her job was withheld from her.

In her affidavit, plaintiff makes three statements which could be construed as being offered in support of the above two claims:

(1) The plaintiff repeatedly asked for, and was repeatedly denied, a description of her job duties and expectations. Plaintiff's Affidavit, §§ 17, 18. This is insufficient to create a disputed issue of fact as plaintiff fails to present any evidence from which a finder of fact could infer that any such denial was gender based (e.g. that a similarly situated male employee received full descriptions and expectations). Indeed, it appears undisputed that plaintiff could have obtained such a description from a third person, and in fact, did so.

(2) Plaintiff received an incomplete and inadequate performance appraisal from Newton on March 1, 1991, while Elmer Haire's (a male employee) appraisal was complete. *See* Plaintiff's Affidavit, §§ 23, 24. It is, however, undisputed that this single discrete act of alleged sex discrimination took place more than 180 days immediately preceding the date that the plaintiff filed her charge of sex discrimination with the EEOC. Hence, this Court is compelled to conclude that the plaintiff is barred from raising a claim of sex discrimination based on the March, 1991 incomplete performance appraisal. *See Wright, supra,* 836 F.2d at 507.

(3) "On three or four occasions, Newton withheld information from me which was important to my doing my job in a satisfactory manner." Plaintiff's Affidavit, § 28. Clearly, without a more specific allegation, this allegation is, on its face, insufficient to create a disputed issue of fact.

Accordingly, AT&T is entitled to summary judgment on plaintiff's claims of sex discrimination.

3. DISPUTED ISSUES OF MATERIAL FACT PRECLUDE THE GRANT OF SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF RETALIATORY DISMISSAL

To make out a *prima facie* case of retaliation under Title VII, the plaintiff must prove by a preponderance of the evidence that (1) she engaged in protected conduct under Title VII; (2) simultaneously therewith or subsequent thereto, she suffered an adverse employment action; (3) there is some causal connection between the protected activity and the adverse employment action. *Morgan v. Jasper,* 959 F.2d 1542, 1547 (11th Cir. 1992); *Whatley v. MARTA,* 632 F.2d 1325, 1328 (5th Cir. 1980).

Once the plaintiff makes her *prima facie* showing, the burden of going forward shifts to AT&T to present evidence that its actions were undertaken because of a legitimate, non-discriminatory reason. If AT&T's proffer of credible, non-discriminatory reasons for its actions is sufficiently probative, then the burden of going forward again shifts back to the plaintiff, who must come forward with specific evidence demonstrating that the reasons given by AT&T were a pretext for discrimination. *Morgan, supra; Donnellon v. Fruehauf Corp.,* 794 F.2d 598 (11th Cir. 1986). Of course, the burden of persuasion remains with the plaintiff throughout the proceedings.

The undisputed facts show that the plaintiff initially filed the instant lawsuit in the Superior Court of Fulton County on July 16, 1992. *See Davis v. AT&T Communications, Inc. and Larry Newton,* Civil Action No. E3871 (Fulton Superior Court). Subsequently, defendant removed the case to this Court on August 19, 1992.

The undisputed facts further show that in November, 1992, approximately four months after the lawsuit was filed, AT&T disability officer Carol Eldridge made the decision which ultimately led to plaintiff's January, 1993 termination: that, based on Dr. Rosen's opinion, plain-

tiff was then able to return to work. In light of the relatively short period of time between the filing of the lawsuit and Eldridge's November decision, and this Court's duty to resolve all doubts in favor of the non-moving party (i.e. the plaintiff), this Court is compelled to conclude that the plaintiff has established a *prima facie* case of a retaliatory discharge. *See Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 110 (1st Cir. 1988) ("A showing of discharge soon after the employee engages in activity specifically protected by . . . Title VII . . . is direct proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation."). *See generally Simmons v. Camden County Board of Education*, 757 F.2d 1187, 1189 (11th Cir. 1985).

In response, AT&T has offered a legitimate non-discriminatory reason for the plaintiff's termination: job abandonment. In other words, once Eldridge de-certified plaintiff's disability, plaintiff was obligated to return to work. When she refused to return to work after being directed twice by Gibb to do so, she was terminated for job abandonment.

As AT&T has articulated a non-discriminatory reason for its actions, plaintiff has the burden of going forward to show that AT&T's stated reason is a pretext for retaliation. This Court is compelled to conclude that the plaintiff has met that burden. Plaintiff has presented, *inter alia*, documentary evidence from which a finder of fact could conclude that as early as October 13, 1992, Eldridge was aware that the palintiff had filed her lawsuit. *See* Exhibit 6 to Plaintiff's Affidavit. As Gibb's decision to terminate was based on Eldridge's November decision to decertify plaintiff's disability, then any evidence which brings into question Eldridge's intent creates a disputed issue of fact as to whether the plaintiff was terminated in retaliation for filing a Title VII lawsuit. *See Hairston v. Gainesville Sun Publishing*, 9 F.3d 913,

921 (11th Cir. 1993) ("the grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the 'elusive factual question of intentional discrimination [citation omitted]' ").

Accordingly, AT&T's Motion for Summary Judgment on plaintiff's Title VII claim of a retaliatory discharge must also be denied.

4. AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S ERISA CLAIM

Section 510 of ERISA (29 U.S.C. § 1140) makes it unlawful "to discharge a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled."

AT&T does not dispute that its disability and sickness benefits plan (under which plaintiff was receiving benefits) is an employee benefit plan covered under § 510. It, rather, contends that the plaintiff failed to exhaust the internal remedies it has made available to parties aggrieved under the policy, before filing suit, as required by *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087, 106 S.Ct. 863, 88 L.Ed.2d 902 (1986). *See also* Defendant's Exhibit 27, pp. 19-20. This Court is compelled to agree.

Plaintiff testified in her deposition that she had not followed the appeals procedure outlined in the AT&T policy. P.D., p. 441. To be sure, an employee is not required to exhaust administrative remedies before filing suit under § 510 if the available appeals procedure proves futile, or if the employer hinders the employee in pursuing the appeal. *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir. 1990).

Here the plaintiff has failed to show that she attempted to pursue an appeal for her decertification under the provisions of the plan, or that AT&T in any way hindered her from doing so. Accordingly, this Court is compelled to conclude that the plaintiff has failed to exhaust the remedies available to her under the plan; and, therefore, AT&T is entitled to summary judgment on plaintiff's ERISA claim. *Compare Curry supra,* 891 F.2d at 846; *see Byrd v. MacPapers, Inc.,* 961 F.2d 157, 160 (11th Cir. 1992).

5. AT&T IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S AMERICANS WITH DISABILITIES ACT CLAIM

The Americans with Disabilities Act (ADA) reads in part as follows:

> No covered entity [10] shall discriminate against a qualified individual with a disability because of the disability [11] of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). In relevant part, an employer violates the ADA (i.e. "discriminates" on the basis of a disability) when it fails to make reasonable accommodations "to the known physical and mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee" unless the employer can

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[10] AT&T, as an employer engaged in an industry affecting commerce who has 25 or more employees, qualifies as a covered employer under the act. *See* 42 U.S.C. § 12111(5).

[11] Under the ADA, a "disability" is defined, with respect to an individual, as (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

show that the necessary accommodating measures would impose an undue hardship [12] on the operation of its business. 42 U.S.C. § 12112(b)(5)(A). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position that the individual holds or desires." [13] 42 U.S.C. § 12111(8).

AT&T contends that the plaintiff does not qualify as a "qualified individual with a disability" under the ADA because AT&T could not have reasonably accommodated her disability as that term is defined. Indeed, the plaintiff testified in her deposition that she was not willing to return to work at AT&T in the next 10 to 15 years, and that she would never be willing to work again for any employer in Atlanta. P.D., pp. 118, 121-122. The defendant contends that, under such circumstances, any attempt by AT&T to accommodate plaintiff on those terms would create an undue hardship on it. This Court is compelled to agree.

Indeed it is clear that the plaintiff has stated that she, in fact, does not wish to work for AT&T. Thus, AT&T cannot reasonably accommodate an employee who is unwilling to work for it. *See Miller v. American Coalition*,

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[12] The ADA defines an "undue hardship" as an action requiring significant difficulty or expense, when considered in light of the nature and cost of the accommodation, the overall financial resources of the employer and other factors. *See* 42 U.S.C. § 12111(B).

[13] Reasonable accommodations" are defined to include (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9).

1 AD Cas. (BNA) 649, 653 (D.C. App. 1984). Furthermore, the plaintiff has failed to present any evidence from which a jury could infer that she was, in fact, willing or able to return to work at AT&T in any capacity. Hence, this Court is compelled to conclude that the plaintiff has failed to create a disputed material fact that AT&T could have reasonably accommodated her based on her disability. AT&T is, therefore, entitled to summary judgment on plaintiff's ADA claim.

6. AT&T AND LARRY NEWTON ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS

The plaintiff essentially contends that (1) Newton's conduct toward her (i.e. his alleged sexual harassment) while she was employed and working at AT&T constituted intentional infliction of emotional distress under Georgia law, for which both Newton and AT&T are liable; (2) AT&T's demand to plaintiff that she return to work, its "threat" to her that she will be fired if she does not return, and its subsequent actions in terminating her when she refused to return to work, all constitute intentional infliction of emotional distress for which AT&T is liable.

a. *Liability of AT&T*

This Court is compelled to conclude that the plaintiff's sole and exclusive remedy for intentional infliction of emotional distress against her employer for acts committed by another employee (i.e. Newton) lies under the Georgia Workers' Compensation Act. O.C.G.A. § 34-9-1 *et seq. See Carswell v. Georgia Power Co.*, 1:90-CV-1196-HTW (N.D. Ga., Order of December 13, 1990, Ward, J.) (adopting the September 30, 1990 Report and Recommendation of Harper, M.J.). Further, Newton's alleged acts were committed outside the scope of his employment (i.e. not in furtherance of AT&T's business);

and as AT&T did not authorize or ratify Newton's conduct, AT&T cannot be held liable therefor. *B.C.B. Co. v. Troutman*, 200 Ga. App. 671, 409 S.E. 2d 218 (1991); *Favors v. Alco Mfg. Co.*, 186 Ga. App. 480, 367 S.E.2d 328 (1988).

b. *Liability of Newton individually*

The plaintiff has shown that she suffered severe emotional distress, and that the environment in which she worked at AT&T was a contributing factor to that distress However, notwithstanding her work-related psychological illness, the plaintiff has failed to show that Newton's conduct toward her during her employment, or any other AT&T employee's conduct toward her at the time of her dismissal, constituted the intentional infliction of emotional distress (i.e. that Newton's or any other AT&T employee's actions were so extreme and outrageous as to cause her emotional distress "so severe that no reasonable [person] could be expected to endure it"). *See Bridges v. Winn-Dixie Atlanta, Inc.*, 176 Ga. App. 227, 335 S.E.2d 445, 447 (1985).

With regard to plaintiff's first claim, this Court agrees that Newton's alleged language and conduct in the plaintiff's presence may have been rude, offensive and inappropriate. Nevertheless, as a matter of law, it does not rise to the level of a "major outrage." *See Bridges, supra*, 335 S.E.2d at 448. With regard to the second claim, the record is devoid of any evidence that anyone at AT&T engaged in any offensive or rude conduct toward the plaintiff in conjunction with her termination; and her termination cannot be characterized as constituting an extreme and outrageous act.

Therefore, both defendants are entitled to summary judgment on plaintiff's intentional infliction of emotional distress claims.

CONCLUSION

IT IS, THEREFORE, RECOMMENDED that Larry Newton's Motion for Summary Judgment be GRANTED in its entirety.

IT IS FURTHER RECOMMENDED that AT&T's Motion for Summary Judgment be GRANTED IN PART, as to plaintiff's claims of sex discrimination and sexual harassment under Title VII, her ERISA claim, her ADA claim, and her claim of intentional infliction of emotional distress; and DENIED as to her claim of retaliation under Title VII.

IT IS SO RECOMMENDED.

This 22nd day of September, 1994.

/s/ Joel M. Feldman
JOEL M. FELDMAN
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:92-cv-1972-GET

ANN DAVIS,
Plaintiff

v.

AT&T COMMUNICATIONS and LARRY NEWTON,
Defendants

ORDER

The above-styled matter is presently before the court on the Magistrate Judge's Report and Recommendation ("R & R") [Docket No. 89] that defendant AT&T's motion for summary judgment be granted in part and denied in part and defendant Newton's motion for summary judgment be granted. Both plaintiff and defendant AT&T have filed objections.

Factual Summary

Plaintiff began working for AT&T in 1965. In August 1990, plaintiff accepted a position as a facilities planner in Atlanta, Georgia. Larry Newton became her supervisor. Plaintiff heard Newton refer to other female employees as "bitch" and "stupid bitch" on several occasions. Newton never called plaintiff a "bitch" but he did raise his voice to her on more than one occasion and Newton intimidated plaintiff. In June 1991, plaintiff complained to AT&T officials about Newton's harassing con-

duct. After an investigation, Newton was disciplined by AT&T.

In August 1991, plaintiff was granted a leave of absence for depression and began receiving disability benefits under AT&T's disability plan. In November 1991, plaintiff's doctor told AT&T that plaintiff was capable of working again, and, therefore, in January 1992, plaintiff returned to work under a reduced workload. On January 22, 1992, plaintiff filed a charge of sex discrimination with the EEOC because of Newton's allegedly harassing conduct.

In June 1992, plaintiff was granted another disability leave because of depression. On July 16, 1992, plaintiff filed the instant lawsuit alleging sex discrimination, sexual harassment and intentional infliction of emotional distress. In October 1992, Carol Ethridge, an AT&T disability case manager, directed plaintiff to submit to a disability evaluation by Dr. Rosen, an independent psychiatrist hired by AT&T, in accordance with AT&T's policy to periodically reevaluate all employees on disability leave. Dr. Rosen determined that plaintiff was not totally disabled and Ethridge recommended that AT&T direct plaintiff to return to work. On December 11, 1992, Paul Gibb wrote plaintiff directing her to return to work by December 28, 1992. On December 15, 1992, plaintiff stated in her deposition that she would never, under any circumstances, work in Atlanta again and would not return to AT&T at any location or in any capacity for at least 10 to 15 years. When plaintiff did not appear for work on December 28, 1992 as requested, Gibb wrote plaintiff a second letter asking her to return to work. Plaintiff refused to return to work, and Gibb terminated plaintiff's employment with AT&T on January 11, 1993.

As a result of her termination, plaintiff amended her complaint to add an Americans with Disabilities Act

('ADA") claim, an ERISA claim and a retaliation claim. Defendants move for summary judgment on all claims.

The Magistrate Judge recommended that defendant Newton's motion for summary judgment be granted in its entirety and that defendant AT&T's motion for summary judgment be granted on plaintiff's sexual harassment claim, disparate treatment claim, ADA claim, ERISA claim and intentional infliction of emotional distress claim. The Magistrate Judge recommended that defendant AT&T's motion for summary judgment on plaintiff's retaliation claim be denied. Both AT&T and plaintiff have filed objections. Plaintiff only objects to the Magistrate Judge's recommendation that her sexual harassment claim against AT&T be dismissed. Defendant AT&T objects to the denial of summary judgment on plaintiff's retaliation claim and to the Magistrate Judge's finding that plaintiff's harassment claim was timely filed.

Because there are no objections to the Magistrate Judge's recommendation that defendant Newton's motion for summary judgment and defendant AT&T's motion for summary judgment on plaintiff's disparate treatment claim, ADA claim, ERISA claim and intentional infliction of emotional distress claim be granted, the court ADOPTS as unopposed the Magistrate Judge's R & R with respect to these claims.

Sexual Harassment Claim

Plaintiff argues that the Magistrate Judge erred in finding that defendant AT&T is entitled to summary judgment on plaintiff's sexual harassment claim. The Magistrate Judge found that a work environment in which Newton lost his temper and used profanity was not "an objectively hostile or abusive environment—an environment that a reasonable person would find hostile or abusive." *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, (1993); *see also Meritor Savings Bank, FSB v. Vinson*, 477 U.S.

57, 67 (1986). This court agrees. Accordingly, for the reasons given in the Magistrate Judge's R & R, which is incorporated by reference, defendant AT&T's motion for summary judgment on plaintiff's sexual harassment claim is GRANTED.

Because defendant AT&T's motion for summary judgment on plaintiff's sexual harassment claim has been granted on the merits, defendant AT&T's objections regarding the timeliness of plaintiff's sexual harassment claim are DISMISSED AS MOOT.

Retaliation Claim

The Magistrate Judge recommended that defendant AT&T's motion for summary judgment on plaintiff's retaliation claim be denied. To establish a prima facie case of retaliatory discharge, plaintiff must show (1) that she engaged in protected opposition to Title VII discrimination; (2) that she suffered an adverse employment action simultaneously with or following the protected activity; and (3) a causal connection between the protected activity and the adverse employment action. *Morgan v. Jasper,* 959 F.2d 1542, 1547 (11th Cir. 1992). The Magistrate Judge found that plaintiff established a prima facie case because of the relatively short time, approximately four months, between plaintiff filing her lawsuit and Ethridge's decision to decertify plaintiff's disability status. AT&T does not dispute that plaintiff has made out a prima facie case.

Once a plaintiff proves a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for plaintiff's discharge. AT&T met this burden by stating that plaintiff was terminated for refusing to return to work. Therefore, plaintiff must present specific evidence showing that AT&T's articulated reason is pretext for retaliation. *Id.* at 1548. The Magistrate Judge found that plaintiff raised a question of fact on the issue of pretext by presenting evidence that Ethridge

might have known about plaintiff's lawsuit when Ethridge directed plaintiff to submit to an evaluation by Dr. Rosen. The Magistrate Judge further stated that any question regarding Ethridge's intent calls into question the reason for plaintiff's discharge.

The only evidence that Ethridge knew about plaintiff's lawsuit comes from a memo written by a receptionist at Dr. Rosen's office following a conversation with Ethridge regarding plaintiff. AT&T objects to the Magistrate Judge's reliance on this memo because it is inadmissible. The court finds that the Magistrate Judge properly considered the memo.

Despite the possibility that Ethridge knew about plaintiff's lawsuit, plaintiff has presented no evidence indicating that Ethridge decertified plaintiff's disability status *because of* the lawsuit. Plaintiff has not shown that Ethridge deviated from established AT&T policy in asking plaintiff to submit to an independent psychiatric evaluation or that another similarly situated employee was permitted to stay on disability leave after a reevaluating doctor, such as Dr. rosen in this case, found that the employee could return to work. The fact that an employer knows about a lawsuit is not, in and of itself, enough evidence to create a question that the employer's reason for discharging the employee is pretextual.

Furthermore, Paul Gibb, not Ethridge, made the decision to fire plaintiff. Plaintiff has not shown that Gibb's reason for terminating plaintiff for her refusal to return to work is pretextual. As the Magistrate Judge found in his discussion of plaintiff's ADA claim (R & R, p. 25), plaintiff stated on December 15, 1994, about a month before the decision was made to terminate her, that she would never work in Atlanta again and that she would not return to AT&T under any circumstances for 10 to 15 years. Plaintiff made it very clear that she had no intention of returning to AT&T even if she was able to

work. Such testimony supports Gibb's assertion that he terminated plaintiff for job abandonment.

Plaintiff has not shown that AT&T's articulated reason for discharging plaintiff is pretext for unlawful retaliation. Accordingly, defendant AT&T's motion for summary judgment on plaintiff's retaliation claim is GRANTED.

SUMMARY

For the above stated reasons, the Magistrate Judge's R & R [Docket No. 89] is ADOPTED IN PART and REVERSED IN PART. Specifically, defendant AT&T's motion for summary judgment is GRANTED in its entirety and defendant Newton's motion for summary judgment is GRANTED.

SO ORDERED, this 29 day of November, 1994.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
Judge
United States District Court

APPENDIX D

[Filed Feb. 2, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:92-cv-1972-GET

ANN DAVIS,

Plaintiff

v.

AT&T COMMUNICATIONS and LARRY NEWTON,

Defendants

ORDER

The above-styled matter is presently before the court on plaintiff's motion for reconsideration of this court's November 29, 1994 order granting defendant AT&T Communications's motion for summary judgment [Docket No. 98].

A motion for reconsideration should be filed only when, after careful consideration, it is deemed "absolutely necessary" by the movant. Local Rule 220-6. Such a motion may not be employed as a vehicle to tender new legal theories or to introduce new evidence that could have been presented in conjunction with the previously filed motion or response. Rather, motions for reconsideration serve the limited purpose of correcting manifest errors of law or fact, or in certain instances, calling newly discovered evidence to the court's attention. Thus, the court is most willing to reconsider a prior ruling on an issue in the face of new Eleventh Circuit or Supreme Court authority.

After reviewing the authorities cited in plaintiff's motion for reconsideration, the court adheres to the ruling set forth in its November 29, 1994 order. Accordingly, plaintiff's motion for reconsideration [Docket No. 98] is hereby overruled and DENIED.

SO ORDERED, this 2 day of February, 1995.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
Judge
United States District Court

Supreme Court, U.S.
FILED
FEB 18 1997
CLERK

No. 96-1109

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ANN DAVIS,
Petitioner,
v.
AT&T COMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 13, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether Title VII cases should be subject to Federal Rule of Civil Procedure 56, whereby summary judgment is granted in the absence of a genuine issue of material fact.

2. Whether the court below properly determined that petitioner failed to proffer admissible or probative evidence that the defendant's reason for its adverse employment action was pretextual.

STATEMENT REQUIRED BY RULE 29.6

Respondent AT&T Communications, Inc., is a wholly owned subsidiary of AT&T Corp. and has no subsidiaries itself.

AT&T Corp., AT&T Communications, Inc.'s parent company, owns an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

This case does not raise the questions of the conflict the petition purports to present. In an unpublished decision the Eleventh Circuit simply affirmed a grant of summary judgment based on the routine application of well-settled principles to a particular set of uncontested facts. Those facts show that petitioner was not subjected to an unlawful retaliatory discharge; she was fired because she refused to return to work.

1. Petitioner began her employment with respondent ("AT&T") in 1965 in Hendersonville, North Carolina. Pet. App. 19a. In 1990, she took a position as Facilities Planner for AT&T in Atlanta. *Id.* In Atlanta, petitioner had "a very demanding supervisor," Larry Newton, who often used demeaning and inappropriate language in the office. *Id.* at 2a. Newton was reassigned in April 1991 and by May had no responsibility over petitioner's work

group. *Id.* at 4a. Following Newton's reassignment, petitioner complained informally about his behavior and then contacted AT&T's EEO department in August 1991 and filed a formal sexual harassment complaint. *Id.* at 22a. AT&T's EEO department conducted an investigation, as a result of which Newton was disciplined, required to attend diversity training classes, and given a lowered performance appraisal, effectively reducing his salary. *Id.* at 5a, 22a-23a.

In August 1991, AT&T granted petitioner a leave of absence with disability benefits for stress-related depression. *Id.* at 5a, 21a-22a. Five months later, AT&T directed her to return to work based on her psychologist's conclusion that she was " 'certainly capable of performing some type of work.' " *Id.* at 23a, 5a. Petitioner was given a new job responsibility with a lighter work load and placed under a new supervisor. *Id.* Upon her return to work, petitioner filed a sex discrimination charge with the EEOC based on Newton's past conduct. *Id.* at 5a.

In June 1992, AT&T granted petitioner a second paid disability leave due to depression. *Id.* at 23a, 5a. The next month she filed a complaint, alleging, *inter alia,* that AT&T and Newton had violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), by creating a hostile work environment and subjecting her to disparate treatment on account of her sex.

In November 1992, petitioner's disability case manager directed her to undergo a second, independent, medical examination. *Id.* at 24a. After the examining psychiatrist determined that petitioner could work, petitioner's supervisor directed her to return to work by December 28, 1992. *Id.* at 6a, 24a. In connection with her lawsuit, petitioner testified that she would not work for AT&T in Atlanta, but admitted that she could work for another employer in North Carolina, where she had since returned. *Id.* Petitioner's supervisor wrote to her again, offering her a job in North Carolina and extending her return-to-work

date until January 4, 1993. *Id.* at 6a, 24a-25a. Petitioner still refused to return to work, and on January 11, 1993, AT&T fired her for abandoning her job. *Id.* at 6a, 25a. Petitioner then amended her complaint to allege that her discharge violated Title VII, 42 U.S.C. § 2000e-3(a), the Employee Retirement Income Security Act, and the Americans With Disabilities Act.

The district court below, in large part adopting the recommendations of a magistrate judge, granted AT&T summary judgment against petitioner on all of her claims. *Id.* at 43a. With respect to her claim of retaliatory discharge—the claim at issue in this petition—the district court held that, although petitioner had made out a prima facie case based on the "relatively short time" between the filing of her lawsuit and her discharge, AT&T had met its burden under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), of providing a legitimate, nondiscriminatory reason for firing petitioner—her admitted refusal to return to work. *Id.* at 41a. The district court found that petitioner's evidence of pretext—a handwritten memorandum from the psychiatrist's office containing the word "lawsuit"—did not tend to show that petitioner's lawsuit against AT&T had been a factor in the decision to decertify her disability status, or subsequently, to discharge her. *Id.* at 42a. In addition, the district court found that petitioner's own testimony that "she would never work in Atlanta again and that she would not return to AT&T under any circumstances for 10 to 15 years," refuted her pretext claim. *Id.*

The Eleventh Circuit affirmed in an unreported decision. The court of appeals held that the petitioner's only evidence of AT&T's alleged pretext in firing her, the handwritten memorandum from the psychiatrist's office, was neither admissible nor probative evidence. *Id.* at 14a. According to petitioner, the word "lawsuit" on the memorandum indicated that AT&T's disability manager was aware of petitioner's lawsuit, and thus demonstrated that

AT&T had a retaliatory motive when it ended petitioner's disability status and directed her to report to work. *Id.* at 15a. The court of appeals held that this claim was "simply not plausible." *Id.*

2. The decision below raises no issue worthy of this Court's review. According to petitioner herself, the federal courts have "continuously and persistently" rejected her argument that summary judgment can *never* be granted where the plaintiff has made out a prima facie case of discrimination. Pet. at 13. Petitioner also acknowledges that neither of the courts below "consider[ed], address[ed], or discuss[ed]" this argument. *Id.* Petitioner's novel assertion that "summary disposition of employment discrimination claims is not permitted under [Federal] Rule [of Civil Procedure] 56," *id.* at 17, is unsupported and should not be considered by this Court for the first time on review.

Petitioner's claim also rests on the mistaken belief that the evidentiary framework established by *McDonnell Douglas* somehow alters summary judgment standards. Under *McDonnell Douglas,* a defendant may rebut a prima facie showing of retaliatory discharge by proffering "a legitimate, nondiscriminatory reason" for the challenged employment action, in which case the presumption of unlawful conduct "simply drops out of the picture." *St. Mary's Honor Ctr.* v. *Hicks,* 509 U.S. 502, 506-07, 511 (1993) (internal quotation omitted). Petitioner argues that the issue of AT&T's alleged retaliatory intent is one of fact. Summary judgment, however, is routinely granted on factual matters where the nonmovant has failed to demonstrate the existence of a "genuine issue." Petitioner provides no reason why Title VII cases—where a prima facie case can be made with little effort, *Hicks,* 509 U.S. at 515, and was made in this case based solely on the "relatively short time" between the filing of petitioner's suit and her discharge—should not be subject to summary judgment once the presumption of wrongdoing has been

rebutted. *Cf. Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) (summary judgment not disfavored in factually complex antitrust suits). Indeed, the blanket exemption from Rule 56 that petitioner seeks would require countless trials in Title VII cases where no genuine issue of material fact exists. Petitioner's claim of legal error is thus mistaken, and does not warrant the Court's review.

3. Petitioner argues in the alternative that summary judgment is *never* proper where the plaintiff presents evidence that the defendant's proffered nondiscriminatory reason is pretextual, even in the absence of evidence that the defendant's true motivation was discriminatory. This alternative argument, however, is not presented in this case.

First, the Eleventh Circuit specifically held that the only evidence supporting petitioner's claim of pretext—the handwritten memorandum from the psychiatrist's office—was neither admissible nor probative. Pet. App. at 14a. This factual determination, which is both correct and, in all events, undeserving of this Court's review, precludes consideration of petitioner's legal claim.[1]

Second, because of this finding, the court below did not even address the issue on which petitioner asserts the courts of appeals have split, *i.e.*, whether a plaintiff's evidence of pretext must also permit the inference of intentional discrimination in order to avoid summary judgment. As a result, petitioner aims her criticism, not at the decision below, but at another Eleventh Circuit

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[1] Any suggestion that petitioner's " 'suspicion of mendacity' " constitutes evidence sufficient to present the issue she seeks to raise, Pet. at 21 (quoting *Hicks*, 509 U.S. at 511), is mistaken. Such a suspicion must be accompanied by "disbelief of the reasons put forward by the defendant." *Hicks*, 509 U.S. at 511. Here, petitioner's own testimony that she refused to return to work confirms, rather than discredits, AT&T's claim that it had a nondiscriminatory reason for terminating petitioner.

case, *Isenberg* v. *Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), Pet. at 18, which the decision below does not purport to follow. Because the court below did not rule on the legal issue petitioner seeks to raise, this case is not an appropriate vehicle for the Court to review this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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